Supreme Court, U.S.
FILED
AUG1 1980
MICHAEL RODAK, JR., CLERK

No. 80-154

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

STANLEY S. MOLES, M.D., Petitioner,

v.

THE MORTON F. PLANT HOSPITAL, INC., a Florida not-for-profit corporation; JOHN B. SWEGER; PAUL STRAUB, M.D.: T. JOHNSON ROSS, M.D.: LAWRENCE R. BUCKLEY M.D.: RICHARD MERIWETHER, M.D.: WADE HATCHER, M.D., Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 78-2300

STANLEY S. MOLES, M.D.,

Plaintiff-Appellant,

versus

THE MORTON F. PLANT HOSPITAL, INC., a Florida not-for-profit corporation, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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(MAY 8, 1980)

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1/]

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

STANLEY S. MOLES, M.D., through his undersigned counsel prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 8, 1980.

QUESTIONS PRESENTED

1. Whether the practice of medicine for compensation through federally funded health care programs (Medicare and Medicaid) and from insurance carriers operating in interstate commerce may have a not insubstantial effect on interstate commerce so that it is within the purview of the Sherman Anti-Trust Act (15 U.S.C. §§ 1 and 2)?

2. Where the Complaint alleges a boycott with the effect of restraining Petitioners' interstate commerce in the provision of health care services for compensation, did the Court below err in affirming the District Court's dismissal of the action on motion for lack of subject matter jurisdiction and failure to state a claim?

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OPINIONS BELOW

The opinion of the District Court for the Middle District of Florida granting Respondents' Motion to Dismiss is printed in Appendix A hereto and is not reported. The Court of Appeals affirmed the District Court without opinion. The per curiam affirmance is printed in Appendix B hereto.

JURISDICTION

The decision of the Court of Appeals printed in Appendix B hereto was entered on May 8, 1980. Rehearing was not sought by Petitioner. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The Federal Statutes involved are the Sherman Anti-Trust Act, 15 U.S.C. §§1, 2 and 15. 15 U.S.C. §1 provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

15 U.S.C. §2 provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemguilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

15 U.S.C. §15 provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

The Complaint was filed in the District Court by two Plaintiffs. The Plaintiff, MYRON W. WHEAT, JR., M.D., did not participate in the appeal to the Fifth Circuit Court of Appeals and is not a party to this Petition.

Petitioner, STANLEY S. MOLES, M.D., is a physician licensed to practice medicine in Florida. He originally was appointed to the Respondent hospital's medical staff in 1964 and was granted "staff privileges" annually thereafter

through 1975. His "staff privileges" were revoked by the hospital on April 7, 1976, upon the recommendation of the individual Respondent doctors. It is important to note the Petitioner Moles was not an employee of the hospital and does not seek employment. His appointment to the hospital's staff ("staff privileges") was and is necessary to utilize the hospital's facilities in the care of his patients.

Petitioner's Complaint was in three counts. Count I alleged a violation of 15 U.S.C. §§1 and 2 with the right to bring a private cause of action conferred by 15 U.S.C. §15. The activity complained of was an unlawful combination and conspiracy to restrain Petitioner's interstate commerce in the provision of health care services for compensation from federal health care programs and from insurance carriers

operating in interstate commerce. Jurisdiction for Count I was invoked under 28 U.S.C. §1337. Count II was a civil rights action and Count III was a libel action arising under state law. The dismissal of Counts II and III was not appealed to the Fifth Circuit Court of Appeals and is not raised in this Petition.

Upon Respondents' pre-answer Motion to Dismiss, the District Court ruled the individual Respondents were all officers or agents of the hospital corporation and there could be no conspiracy among those individuals and the corporation. In fact, the individual Respondent doctors were not acting as officers or agents of the corporation and no facts to support the District Court's ruling in this regard were presented.

After determining there could be no net change in interstate commerce

as a result of the complained-of activities, the Court concluded:

> "The amount of work Plaintiffs do may be reduced as a result of Defendants' actions, but this work involves practicing medicine and furnishing medical services which is wholly intrastate."

(District Court opinion, Page 12, Appendix A hereto). No facts to support either of these conclusions were presented to the Court.

The District Court entered its judgment of dismissal (Appendix A hereto). Appeal was timely taken to the Fifth Circuit Court of Appeals. Oral argument was taken by the Fifth Circuit on May 6, 1980, and its per curiam affirmance of the dismissal was filed May 8, 1980 (Appendix B hereto).

REASONS FOR GRANTING THE WRIT

1. This case merits review by this Court on certiorari to decide whether the practice of medicine for compensation through federally funded health care programs (Medicare and Medicaid) and from insurance carriers operating in interstate commerce may have a not insubstantial effect on interstate commerce so that it is within the purview of the Sherman Anti-Trust Act (15 U.S.C. §§ 1 and 2).

2. This case merits review by this Court on certiorari because the decision of the Court below deviates substantially from the pronouncements of the Supreme Court that antitrust actions should not be dismissed on pre-answer motion with no opportunity for discovery and proof of subject matter jurisdiction.

ARGUMENT

POINT I

This case presents the question of whether medical doctors who provide care to local patients in local hospitals in exchange for compensation through health care and insurance programs which operate in interstate commerce may have a not insubstantial effect on interstate commerce for purposes of Sherman Act jurisdiction. This fundamental question is of great and recurring significance in defining the application of the Sherman Anti-Trust Act to the health care industry.

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), this Court determined the business of lawyers who provide title insurance for out-of-state real estate lenders has a not insubstantial effect on interstate commerce. In Hospital Building Co. v. Trustees of Rex

Hospital, 425 U.S. 738 (1976), this Court determined the anticompetitive efforts of one local hospital directed at another local hospital may be examined under the Sherman Act. In McLain v. Real Estate Board of New Orleans, Inc., __ U.S __, 100 S.Ct. 502, __ LEd.2d __ (1980), this Court determined the services of local real estate brokers, and price fixing with respect to commission rates may have a not insubstantial effect on interstate commerce for Sherman Act purposes.

The Court below, in the instant case, has denied application of the Act to medical doctors, agreeing with the Tenth Circuit that the practice of medicine and furnishing medical services involves, as a matter of law, only intrastate activities and is, therefore, outside the purview of the Act. As discussed infra, based on recent Supreme

Court decisions, the Tenth Circuit appears ready to recede from that doctrine.

In the instant case, the Fifth Circuit affirmed the Court's pre-answer dismissal of the complaint without opinion. The District Court, in an unpublished opinion (Appendix A hereto), reviewed Petitioner's interstate commerce allegations, determined there would be no net effect on interstate commerce and held:

> "The amount of work plaintiffs do may be reduced as a result of defendants' actions, but this work involves practicing medicine and furnishing medical services which is wholly intrastate. See Wolf v. Jane Phillips Episcopal-Memorial Center, 513 F.2d 684 (10th Cir. 1975)." (District Court Opinion, Page 12, Appendix A hereto). hereto).

Wolf v. Jane Phillips Episcopal-Memorial Center holds that the practice of medicine is not trade or commerce within the

purview of the Sherman Act. In Crane v. Intermountain Health Care, Inc., __ F.2d __ (10th Cir. 1980) (1980-1 Trade Cases ¶63122, p. 77593, 10th Cir. Case No. 78-1346), the Tenth Circuit panel relied on Wolf to decide a pathologist was neither engaged in nor had an effect on interstate commerce. The plaintiff in Crane urged that Wolf was superseded by Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976) and Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The Tenth Circuit panel declined to overrule the Wolf doctrine, notwithstanding those cases, holding "one panel of the court of appeals should not overrule the decision of another panel." (Crane, supra, at p. 77596).

Judge McKay, specially concurring in the Crane result wrote:

> "'In the Sherman Act, Congress has been taken to have exer-

> cised to the fullest its power over commerce' [citation omitted]. I do not believe that our opinion in [Wolf] is consistent with either that congressional purpose or recent Supreme Court pronouncements. At this late date, we can no longer reasonably assert that the 'business of practicing medicine and furnishing medical services is wholly intrastate'in character [citing Wolf]." Crane, supra, at p. 77596.

Until Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), there was a serious question as to whether doctors were engaged in "commerce" by reason of the so-called "learned profession exemption". Goldfarb held that the professions have a business aspect through the exchange of services for money. Recognizing the fact of that commerce, but relying on the Wolf doctrine, the Court below held the practice of medicine and medical services are, as a matter of law, performed wholly intrastate and are,

therefore, outside the purview of the Sherman Act.

It is not the local character of the activity itself which determines jurisdiction. In Goldfarb, jurisdiction was based on the interstate aspects of real property transactions involving title insurance to out-of-state lenders. The rule was reiterated in Hospital Building Company:

> "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." Hospital Building Company, supra.

Judge McKay, in Crane, supra, quoted the test as stated in L. Sullivan, Antitrust 710 (1977):

> "Under the 'affecting commerce' test, 'it is not the quantitative substantiality of the impact on the flow of commerce that is critical. . .; if a local activity has in a practical sense a significant

> impact on competition in commerce and if the commerce so affected is substantial in amount, the [Sherman] Act applies to the local activity. . .'." Crane, supra at p. 77596.

This Court, in Goldfarb and Hospital Building Company, decided that it is in the practical sense that inquiry as to interstate commerce involvement is to be made. But Wolf, and the instant case, limit the inquiry to whether the activity itself is in interstate commerce. The result is anomalous: A doctor practicing near the border of a state who has out-of-state patients is involved in interstate commerce and the Act applies (See; e.g., Feminist Women's Health Center v. Mohammed, 586 F.2d 530 (5th Cir 1978). Another doctor, practicing in central Florida whose patients are principally local is not in interstate commerce. Both doctors, however, receive

payment from the same interstate fund (Medicare, Medicaid and insurance), and it is that payment which creates the commerce. Merely performing the services, without compensation, is not "trade" or "commerce". As held in Goldfarb, it is the exchange of services for money which is commerce. Therefore, the local nature of the services themselves is irrelevant. And, therefore, Judge McKay is correct in Crane, supra, when he writes the Wolf doctrine is not valid in light of Goldfarb and Hospital Building Company.

The Supreme Court, in McLain v. Real Estate Board of New Orleans, Inc., __ U.S. __, 100 S.Ct. 502, __ LEd.2d __ (1980), collected and summarized the jurisdictional authority relevant to this case. In that case, the bare allegations of the Complaint coupled with the allega-

tion that the respondents were engaged in an unlawful restraint of "interstate trade and commerce" was held sufficient. The Supreme Court decided that:

> "Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce. Where, as here, the services of respondent real estate brokers are often employed in transactions in the relevant market, petitioners at trial may be able to show that respondents' activities have a not insubstantial effect on interstate commerce." McLain, supra.

In McLain, the petitioner was peripherally involved with the activities involving interstate commerce. In the instant case, the petitioner is directly involved in the flow of interstate funds. The physician not only receives payment by virtue of the interstate flow of

benefits, but assists in determining the size of the fund available for payments through establishment of the "usual and customary" fee for services in the relevant market area.

The entire purpose of antitrust legislation is to promote quality, availability and lower cost to the consumer through discouragement of anticompetitive practices. The benefits of free enterprise and competition, recognized in all other industries, should now be recognized in the technologically modern but structurally archaic health care industry. The cost of health care has been increasing dramatically while the industry remains, for practical purposes, exempt from any requirement that the cost of services rendered be determined competitively. The federal government mandates control over technological costs

through requiring the states to adopt "certificate of need" legislation. In that way, expensive equipment and buildings are not duplicated or triplicated locally without demonstrating the necessity of multiple similar facilities. The result, however, absent the free availability of those facilities to all qualified physicians, is to create local monopolies and encourage the evils which the Sherman Act seeks to eliminate.

The President of the United States, in his State of the Union Address January 23, 1978, emphasized:

> "We must act now to protect all Americans from health care costs that are rising one million dollars an hour, 24 hours a day - doubling every five years. We must take control of the largest contributor to that inflation - skyrocketing hospital costs." As reported in the "St. Petersburg [Florida] Times", January 24, 1978.

Continuing, the President insisted:

> "We must also fight inflation by improvements and better enforcement of antitrust laws, and by reducing government obstacles to competition in the private sector." Ibid.

In the health care industry, consumption decisions as to cost, availability and quality are made not by the consumer but by the provider. The individual practitioner, as in the instant case, may be removed from the market arbitrarily, simply and effectively. The result is to create local monopolies which control the availability, quality and cost of health care services paid for through interstate commerce and the destruction of the affected practitioner's interstate commerce. The problem was aptly stated by Mr. Joe Sims, Deputy Assistant Attorney General for Antitrust:

> "The benefits of a free enterprise society are widely extolled in the abstract but are frequently shuffled aside in specific situations. It is inevitably the case of those who seek exceptions from the ordinary free enterprise rules, or those seeking to undertake particular anticompetitive activities, are capable and willing to make the case for their proposed course of conduct; and we see today in the health care field the results of that effective advocacy."
> Mr. Joe Sims, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, speaking at The Second Annual Seminar on Antitrust In the Health Care Field, December 12, 1977, as published in Antitrust in the Health Care Field, 76, National Health Publishing Ltd., Townsend, MD. 1979 (p.84).

ARGUMENT

POINT II

The dismissal on motion adjudicated, as a matter of law, the question of fact as to whether the practice of medicine has a not insubstantial effect on interstate commerce.

This Court, in Hospital Building Company v. Trustees of Rex Hospital, 425, U.S. 738 (1976), restated the rigorous test to be applied on motion to dismiss:

> "We have held that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief [citation omitted]. And in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators' [citation omitted], dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly."

With no facts before it other than those alleged in the complaint, the District Court concluded there could be no net effect on interstate commerce and, therefore, no subject matter jurisdiction.

> "Although plaintiffs' interstate commerce allegations are set forth at length in the complaint, they all center upon one fact. Many patient bills are paid by insurance companies or by the federal government. Funds for the payment of these bills necessarily travel in interstate commerce. Plaintiffs allege that the amount of funds received by them from the Federal government and interstate insurance carriers is dependent upon plaintiffs' access to hospital facilities." (Opinion, Appendix A, p. 10)

The Court recognized, therefore, the involvement of interstate commerce but decided there could be no net change on that commerce:

> "It is plaintiffs' patients who are responsible for the payment of plaintiffs' fees, however. These fees are incurred for services performed intrastate. The patients are local residents. There has been no allegation that defendants have caused any increase (or decrease) in fees charged thereby causing a change in the flow of insurance benefits flowing in interstate commerce

> from the federal government and/or insurance carriers to the ultimate beneficiaries." (Opinion, Appendix A, p. 11)

Thus, the Court found the fact of interstate commerce involvement was alleged but determined, on motion to dismiss, its flow could not be altered as a result of the respondents' activities.

No matter who the "ultimate beneficiaries" are with respect to the interstate flow of health care funds it is Petitioner and other physicians who not only stimulate but directly cause the flow to occur. As this Court held in McLain v. Real Estate Board of New Orleans, Inc. ___ U.S. ___, 100 S.Ct. 502, ___LEd.2d ___(1980), ". . .whatever stimulates or retards the volume [of interstate commerce]. . ." may have a not insubstantial effect on that interstate commerce. As the Court held in McLain, Petitioner should be allowed to prove the effect at trial.

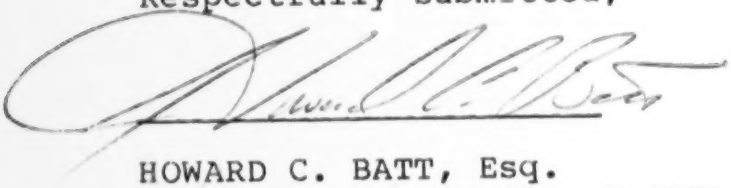
CONCLUSION

The business part of the health care industry is conducted entirely interstate. It is inconceivable that this very significant business, which consumes such a substantial part of the gross national product and which has such a direct and dramatic economic effect on nearly every American consumer of health care services and insurance, should be outside the purview of the Sherman Act.

This Court should review this case to determine whether the rules announced in Goldfarb and McLain, supra, are applicable to the practice of medicine and delivery of health care services. This Court should determine, through granting the petition, whether the Court below was correct in deciding that, in no event, could the practice of

medicine have any effect on interstate commerce.

Respectfully submitted,



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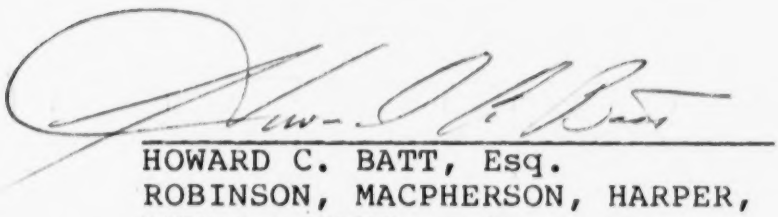
CERTIFICATE OF SERVICE

I, HOWARD C. BATT, Attorney for STANLEY S. MOLES, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1ST day of August, 1980, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the the several Respondents thereto, as follows:

> On all the Respondents, by leaving three copies thereof at the office of of Emil C. Marquardt, Jr., Esq., Counsel for the Respondents, at his office at 400 Cleveland Street, Clearwater, Florida 33515.



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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STANLEY S. MOLES, M.D. et al.,

Plaintiffs,

vs. Case No. 75-574-Civ-T-Y

THE MORTON F. PLANT HOSPITAL, INC., etc., et al.,

Defendants.

MEMORANDUM OPINION

This cause is before the Court on the defendants' motion to dismiss the complaint. Extensive memoranda have been filed by both sides in the case. On October 12, 1977 the Court heard counsel for the parties argue the motion. A ruling was deferred so that the Court might take the matter under advisement.

Because this case comes before the Court on a motion to dismiss, the

only relevant facts are those alleged in plaintiff's complaint. All allegations of the complaint must be presumed true for purposes of the Court's ruling. The complaint should not be dismissed for failure to state a claim unless if appears beyond a doubt that the plaintiffs can prove no set of facts in support of their claim. Cruz v. Beto, 405 U.S. 319, 322 (1972); Mann v. Adams Realty Co., Inc., 556 F.2d 288, 293 (5th Cir. 1977). The Fifth Circuit has tended to disfavor the granting of motions to dismiss except in those cases where the plaintiff has been afforded every opportunity to state a claim upon which relief can be granted, but has failed to do so. See Hitt v. City of Pasadena 561, F.2d 606 (5th Cir. 1977).

The complaint at bar consists of three counts. All three involve a

refusal by defendant Morton F. Plant Hospital, Inc. to renew the Hospital staff privileges of Dr. Stanley S. Moles and to grant the application of Dr. Myron W. White, Jr. for staff privileges in the first place. The court will address itself to each count separately.

COUNT ONE

Count One of the complaint alleges a violation of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§1 & 2). The defendants are alleged to have combined and conspired with one another to prevent plaintiffs from having access to hospital facilities in the Clearwater, Florida area. The individual defendants are alleged to have acted in excess of their authority as officials of the defendant hospital in making the decision not to renew plaintiff Moles' staff privileges and not to consider

plaintiff Wheat's application for new staff privileges.

Plaintiffs have argued that Count One states a claim based upon a theory of group boycott. As such, plaintiffs argue that the defendants' conduct falls into the category of cases involving per se violations of the Sherman Act and that the reasonableness of defendants' actions is therefore immaterial. See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457 (1941).

Crucial to plaintiffs' allegations of boycott, however, is the allegation that the individual defendants were acting as such and not as officers of the defendant hospital. The case law is well settled that the Sherman Act's conspiracy or agreement requirement is not met by a

"conspiracy" between a corporation and its corporate officers. Soloman v. Houston Corrogated Box Co., Inc., 526 F.2d. 389, (5th Cir. 1976).

Looking at paragraphs 5 thru 9 of the complaint, the Court finds plaintiffs have alleged therein the capacity of each defendant. The Hospital is alleged to be a not-for-profit corporation, and defendant John Sweger is alleged to have been Chairman of the defendant Hospital's Baord of Trustees. The Board of Trustees allegedly has final authority regarding medical staff appointments. Defendant Roger White is alleged to be the Hospital's Executive Director in charge of daily administration. Neither Sweger nor White are doctors.

The five remaining defendants are doctors. All are alleged to be members of the Executive Committee of the

defendant Hospital's medical staff. Defendant Paul Straub was Chairman of the Executive Committee. The other four doctors constituted an ad hoc committee of the Executive Committee. This ad hoc committee was convened on January 29, 1976 to review the actions of the full Executive Committee in refusing to renew plaintiff Moles' medical staff privileges.

Despite conclusory allegations later in the complaint, Count One fails to allege how the four defendants on the ad hoc committee have anything to do with the hospital's refusal to consider plaintiff Wheat's application for staff privileges. The Court finds a real distinction between the refusal to renew Moles' privileges and the administrative denial of plaintiff Wheat's initial application for privileges. Although portions of plaintiffs' complaint seem to

equate the two events, other allegations of the complaint demonstrate that the two are entirely different transactions, although they involve the same hospital.

As paragraph 11 of the complaint alleges, plaintiff Wheat's application was denied by the defendant Hospital's administration without consideration. The application was apparently not referred to the Hospital's doctors for consideration. This allegation characterizes a single refusal to deal, not a group boycott, and as such is not prohibited by the Sherman Act. But even assuming plaintiff Wheat has been the victim of the same sort of actions as plaintiff Moles, the question of group boycott remains.

Aside from the conclusory allegations in paragraph 27 of the complaint that the individual defendants acted

"in excess of their authority as hospital officials," the complaint lacks any allegations of fact to show that the individual defendants were not acting as officers of the hospital corporation. At issue therefore is whether this allegation alone is sufficient to state a claim for relief. The Court is aware of course, that dismissals in antitrust proceedings, prior to giving plaintiff an opportunity for discovery, should be granted very sparingly. Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738, 746 (1976). A close examination of the nature of the case at bar is therefore warranted in order to determine if this case presents an exception to the general rule.

In order to state a claim for relief, plaintiffs must allege some facts which indicate a true conspiracy, rather

than a single refusal to deal on the part of a corporation. In the case at bar plaintiffs have failed to allege any facts - as opposed to mere legal conclusions - which would indicate that the defendants (sic) hospital was capable of conspiring with those persons who are alleged to be its own officers and agents.

But the court need not make consideration of this question alone dispositive. Before deciding the motion in the case at bar one further ground for dismissal deserves discussion. The defendants have challenged plaintiffs' allegations of a substantial effect upon interstate commerce.

Fourteen paragraphs of plaintiffs' complaint are devoted to allegations regarding interstate trade and commerce. Concededly, the facts of this case involve one private local

hospital and two local doctors who seek to practice therein. Any conspiracy, assuming one exists, is purely local and is not "in interstate commerce". In order to invoke this court's jurisdiction in stating a claim for relief as to Count One, plaintiffs' must therefore adequately allege that the defendants' conduct has a substantial effect on interstate commerce. Hospital Building Co. v. Trustees of the Rex Hospital, 425 U.S. 738 (1976).

Although plaintiffs' interstate commerce allegations are set forth at length in the complaint, they all center upon one fact. Many patients bills are paid by insurance companies or by the federal government. Funds for the payment of these bills necessarily travel in interstate commerce. Plaintiffs' allege that the amount of funds received by them from the federal government and

interstate insurance carriers is dependent upon plaintiffs' access to hospital facilities.

It is plaintiffs' patients who are responsible for the payment of plaintiffs' fees however. These fees are incurred for services performed intrastate. The patients are local residents. There has been no allegation that defendants have caused any increase (or decrease) in fees charged thereby causing a change in the flow of insurance benefits flowing in interstate commerce from the federal government and/or insurance carriers to the ultimate beneficiaries.

Defendants' actions have not been alleged to affect plaintiffs' relationships with the insurance carriers or the federal government. Nor have defendants' actions affected plaintiffs'

patients' relationships with their insurors. It is not alleged that the patients will purchase any less insurance as a result of defendants' actions. Plaintiffs' still are entitled to be paid just the same for the work they do. The amount of work plaintiffs' do may be reduced as a result of defendants' actions, but this work involves practicing medicine and furnishing medical services which is wholly intrastate. (See Wolf v. Jane Phillips Espicopal-Memorial Center, 513 F.2d 684 (10th Cir. 1975).

Counsel for the defendants has called the court's attention to the recent order entered by Judge Robinson in the case of Ann Morgolin (sic) v. Morton Plant Hospital, et al., No.75-209-Civ-T-H (M.D. Fla., Feb. 17, 1978). Judge Robinson granted the defendants' motion

to dismiss at the conclusion of the plaintiff's presentation of evidence at trial. The Court found insubstantial effects upon interstate commerce to justify relief under the sherman Act. Counsel for plaintiffs in the case at bar have pointed out to the court that the present case is in a wholly different posture, there having been no discovery or presentation of evidence.

Plaintiffs' are correct in attacking defendants' reliance upon the Margolin case. At the same time, however, this Court cannot shut its eyes to the reality of the situation at hand. The allegations of plaintiffs' complaint, taken as true, do not indicate a situation substantially different from that presented to the court in Margolin.

Moreover, the allegations of the case at bar do not rise to the same

level as the combination of factors that was found to be significant to state a claim in Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. at 744. Here all the allegations regard a diminution of interstate insurance payments to plaintiffs, but the flow in interstate commerce would be the same. The affect of defendants' actions would be on plaintiffs but not on the flow of interstate commerce. This differs from the Rex Hospital case where it was alleged that interstate commerce would be substantially reduced by the loss of plaintiffs' purchases of supplies. The plaintiff hospital in Rex Hospital also allegedly paid over its revenue to an out-of-state parent corporation. Those payments were alleged to be reduced by defendants' actions. Finally, the Supreme Court noted the plaintiff's allegations that

the financing for the plaintiff hospital's planned expansion, which had been allegedly thwarted by defendants' actions, would be substantial and would come from out of state lenders. Neither a combination of such factors nor any of them is alleged in the case at bar.

Taking into consideration all the allegations set forth in Count One of the complaint, the Court finds that Count One fails to state a claim for relief. Not only are the interstate commerce allegations insufficient, but in addition, the allegations of conspiracy fail to adequately allege that some person other than an officer or agent of the defendant hospital corporation conspired with the defendant hospital. Each of these defects, when viewed separately and in conjunction with each other, justify the Court's granting of the defendants'

motion to dismiss Count One of the complaint.

COUNT TWO

[DELETED AS IRRELEVANT TO THIS PETITION]

COUNT THREE

[DELETED AS IRRELEVANT TO THIS PETITION]

Separate judgment shall be entered in accordance herewith.

DONE AND ORDERED in Chambers at Orlando, Florida this 10th day of May, 1978.

/s/ GEORGE C. YOUNG
CHIEF JUDGE

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

STANLEY S. MOLES, M.D. et al.,

Plaintiffs,

vs. Case No. 75-574-Civ-T-Y

THE MORTON F. PLANT HOSPITAL, INC., etc., et al.,

Defendants.

_____/

J U D G M E N T

In accordance with the Memorandum Opinion entered simultaneously herewith, it is

ORDERED AND ADJUDGED that the defendants' motion to dismiss Counts One and Two of the complaint be and is hereby granted; and it is further

ORDERED and ADJUDGED that the defendants' motion to dismiss Count Three of the complaint be and is hereby granted, but without prejudice to plain-

tiffs refiling the same in the appropriate state court.

SO ORDERED in Chambers at Orlando, Florida, this 10th day of May, 1978.

/s/ GEORGE C. YOUNG
CHIEF JUDGE

Copies to:

Counsel of record

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

STANLEY S. MOLES, M.D. Petitioner, vs. MORTON F. PLANT HOSPITAL ASSOCIATION, INC., a Florida not-for-profit corporation, JOHN B. SWEGER; PAUL STRAUB, M.D.; T. JOHNSON ROSS, M.D.; LAWRENCE R. BUCKLEY, M.D.; RICHARD MERI-WETHER, M.D.; and WADE HATCHER, M.D., Respondents.	)	Case No. 80-154

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE

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STATEMENT OF THE CASE

The Petitioner's Complaint was filed July 21, 1976. It was amended on September 3, 1976, and Myron W. Wheat, M.D., was added as a party plaintiff. Defendants moved to dismiss the amended complaint on September 27, 1976, and extensive Memoranda of Law were filed by both sides. Oral argument on the motion was had on October 12, 1977, and on May 10, 1978, the court entered its Memorandum Opinion and Judgment of Dismissal, copies of which are attached to the petitioner's brief.

Notice of Appeal was filed on June 7, 1980, by plaintiff, Moles, contesting the court's ruling on the dismissal of Count I of the amended complaint pertaining solely to Sherman Antitrust violations. No appeal was taken on the remainder of the court's order, nor did plaintiff Wheat join in the appeal as to any Counts. Oral argument was had before the United States Court of Appeals for the Fifth Circuit on May 6, 1980. The Per Curiam Affirmance of the District Court opinion was entered on May 8, 1980. Petition for Writ of Certiorari was filed in the Court on August 1, 1980.

STATEMENT OF THE FACTS

Petitioner Moles is a cardiologist, licensed to practice medicine in Florida, and was previously on the staff at Morton F. Plant Hospital, which is located in Clearwater, Pinellas County, Florida. On April 7, 1976, after a myriad of hearings and appeals, the Board of Trustees of the defendant hospital followed the recommendation of the Credentials Committee, the Executive Committee of the medical staff, the ad hoc Committee of the medical staff, and the Appellate Review Committee, and did not reappoint Petitioner Moles to the hospital's medical staff. The hospital's by-laws provide for this procedure, and it was fully and correctly carried out. Petitioner Moles has not contested that procedure by was of his lawsuit or any of the appeals in relation thereto.

Previously, Plaintiff Wheat, a cardiovascular and thoracic surgeon specializing in open heart surgery, had made application for staff privileges at Morton F. Plant Hospital to become a member of the hospital's open heart surgery team. His application was denied.

Petitioner Moles and Plaintiff Wheat filed their amended complaint in three Counts based on 1) Sherman Antitrust violations, 2) Civil Rights and Constitutional violations, and 3) Defamation, pertaining to Petitioner Moles alone. Only Petitioner Moles appealed the dismissal of the action, and his appeal pertained only to Count I relating to Sherman Antitrust violations.

The amended complaint identifies the defendants as the Morton F. Plant Hospital, a Florida not-for-profit corporation, located in Clearwater, Pinellas County, Florida; the chairman of the hospital's Board of Trustees; the executive director of the hospital; chief of the medical staff of the hospital; and the individual members of the ad hoc Committee of the Executive Committee of the hospital.

Petitioner Moles utilized fourteen paragraphs under the heading of "Trade and Commerce" to state that he ultimately receives some funds for services rendered to his patients from out of state insurance companies and from the Medicare and Medicaid programs of the Federal Government. Thus, to establish the jurisdictional requirements of interstate

commerce, Petitioner Moles merely alleged that some funds which he ultimately receives crossed state lines.

The next section of Count I is entitled "Violation Alleged". Petitioner Moles repeatedly stated that the defendants "combined and conspired" or have formed an "unlawful combination and conspiracy", all of which results in not allowing him to be on the defendant hospital's medical staff.

Next, petitioner listed the effects of this "unlawful combination and conspiracy" and stated that the defendants' activity amounted to a group boycott against him. Some of these paragraphs make reference to some form of exclusivity, although petitioner does not specify its nature in Count I. From other portions of the complaint, however, it is alleged that the defendant hospital has facilities for open heart surgery. Plaintiff Wheat is an open heart surgeon; petitioner Moles is a cardiologist and would not participate or utilize the open heart surgery facilities. The amended complaint ends with a pray for relief seeking treble damages, an injunction, and attorney fees.

It is interesting to note that the individual doctor defendants, described as being members of the ad hoc

Committee of the Executive Committee of the medical staff in paragraph nine of the amended complaint, are primarily sued because of their "defamatory" remarks contained in their committee report which recommended the nonreappointment of petitioner Moles to the hospital medical staff. In fact, petitioner Moles has sued each of them now in State Court. Each of those defendant doctors, however, has a specialty other than cardiology and does not practice in competition with petitioner Moles.

POINT I

THE AMENDED COMPLAINT DOES NOT ALLEGE A CONSPIRACY TO BOYCOTT OR MONOPOLIZE.

POINT II

THE PLAINTIFF AMENDED ALLEGATIONS ARE INSUFFICIENT TO ESTABLISH SHERMAN ACT SUBJECT MATTER JURISDICTION IN THAT THERE IS NOT A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE.

Argument

POINT I

The amended complaint does not allege a conspiracy to boycott or monopolize.

The Honorable George C. Young, Chief Judge of the United States District Court for the Middle District of Florida, premised his dismissal of Count I of petitioner Moles' amended complaint on two gounds, both of which are easily discernable by a cursory reading of his memorandum opinion: 1) Moles has not alleged a conspiracy to boycott or monopolize for from the face of the Amended Complaint he has alleged no more than a single refusal to deal on the part of a corporation; and 2) Moles has failed to allege sufficient ultimate facts to establish a substantial effect on inter-

state commerce upon which to premise Sherman Act subject matter jurisdiction. In his Petition, Moles totally ignores the first basis upon which his amended complaint was dismissed. This deficiency is crucial in light of the well settled law on the point.

Moles states in his introductory remarks to Count I of his amended complaint that this action is premised on "a continuing violation of the Antitrust Laws of the United States (15 USC §§1 and 2) by the Defendants." (¶1, amended complaint, R-3). Thereafter, in paragraphs 26 through 34, Moles repeatedly uses the phrases, "combination and conspiracy" or "combined and conspired" to described the Defendants' activities. This language culminates in paragraph 30:

> Defendants' combination, conspiracy and intent amount to a group boycott against Plaintiff in unreasonable restraint of commerce.

It is axiomatic that to have a "group boycott" you must have a group. A review of Moles' amended complaint reveals, however,

that he has alleged no "group" cognizable in antitrust actions.

Paragraphs 5 through 9 identify the Defendants. Morton F. Plant Hospital, Inc. is alleged to be "a Florida not-for-profit corporation" (¶5). John B. Sweger is "a member of Defendant Hospital's Board of Trustees and was its Chairman at all times material to this complaint" (¶6). Roger S. White "is the Executive Director of Defendant Hospital charged with its administration on a daily basis, management of its business affairs and coordination between the medical staff and the Board of Trustees" (¶7). Paul Straub was "the Chief of Medical Staff at Defendant Hospital and was Chairman of the Executive Committee of the Medical Staff" (¶8). The remaining four defendants are identified as:

> members of that committee of the Executive Committee of Defendant Hospital's Medical staff known as the "Ad Hoc Committee" which convened January 29, 1976 to review the Executive Committee's recommendation that Plaintiff Moles not be reappointed to the medical staff.
> (¶9)

Unmistakably, Moles has alleged that all individual Defendants are officers, employees or agents of the Defendant Hospital

corporation.

The law is well established under Section 1 of the Sherman Antitrust Act, 15 USCA §1, that there must be a combination, conspiracy, or contract in restraint of trade to allege a violation. See Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); Quigley v. Exxon Co., 376 F.Supp. 342 (E.D. Pa. 1974). To have any of the above, it is definitional that there be at least two persons or entities. See Timkin Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

If a corporation is involved in the alleged conspiracy or combination, it must interact with another entity or individual before there is a violation. The mere action within the corporation is insufficient to formulate a conspiracy. As was so aptly said by the court in Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 at 914 (5th Cir. 1952):

> A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. . . .

A corporation cannot conspire or combine with its officers or agents to violate the Antitrust laws. Solomon v. Houston Corrogated Box Co., Inc., 526 F.2d 389, 396 (5th Cir. 1976); Quigley v. Exxon Co., 376 F.Supp. 342 (E.D. Pa. 1974). See Mackey v. Sears Roebuck & Company, 237 F.2d 869 (7th Cir. 1956), cert. dismissed, 355 U.S. 865 (1957).

Here, a single hospital has declined to renew Moles' staff privileges pursuant to the procedures provided for in the Hospitals' by-laws. No one has denied any medical services to any patient. Also, none of the doctor defendants practice the same specialty as petitioner or are involved with the open-heart surgery team.[1] This case involves no more than a single refusal to deal with the Plaintiff by the Defendant Hospital.

Section 1 of the Sherman Act prohibits combinations, conspiracies and contracts in restraint of trade. Bare bones allegations concerning these purported restraints will not be tolerated—the plaintiff who seeks to recover for a

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[1]Plaintiff is a cardiologist. Ross is a urologist; Buckley and Hatcher are general surgeons; Straub is a family practitioner; and Meriwether is a pediatrician.

violation of the antitrust laws must specify with at least some degree of particularity, the overt acts in which the Defendants allegedly engaged. Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 1993 (5th Cir. 1979); Adams v. American Bar Association, 400 F.Supp. 219 (E.D. Pa. 1975).

Moles alleges that the Defendants entered into a conspiracy to deny him staff privileges at Defendant Hospital. No statements of ultimate fact are alleged to establish this combination and conspiracy. Moles merely says the Defendants' activity was arbitrary and thus, unlawful. Such conclusory pleadings do not state a cause of action under Section 1 of the Sherman Act.

Furthermore, and more importantly, the Petitioner was not pled the necessary injury to the public to bring his amended complaint under Section 1 and entitle him to any relief. Kinniar-Weed Corp. v. Humble Oil, 214 F.2d 891 (5th Cir. 1954). In Riggall v. Washington County Medical Society, 249 F.2d 266 (8th Cir. 1957), cert. denied, 355 U.S. 954 (1958), the plaintiff sought to redress his denial of

membership in the local medical society. The court, in denying the relief sought by plaintiff, observed that

> . . . the complaint is confined to plaintiff's private medical practice. It charges no economic burden on the public by reason of the alleged acts of the defendants. There is no charge that the rejection of plaintiff's application for membership in the Washington County Medical Society resulted in the raising or fixing of fees charged the public by other physicians . . . Plaintiff has not been prevented from practicing his profession, but in the final analysis, his complaint is that he could practice it more profitably but for the acts of the defendants. The Sherman Antitrust Act was not primarily to protect the individual but a private party may not recover under the act unless there has been an injury to the general public economically. 249 F.2d at 268 (citations omitted).

In the case at bar, Moles has not alleged any injury to the public in the form of higher fees or price fixing or any other economic burden. Nor does the amended complaint allege that the purported activity has prevented him from practicing his profession. All Moles has alleged is that he could practice more profitably at the Defendant Hospital. That allegation does not establish a Section 1 Sherman Action Violation.

There is no injury to the public.[2] See Sokol v. University Hospital, Inc., 402 F.Supp. 1029 1029 (D. Mass. 1975; Adams v. American Bar Association, 400 F.Supp. 219 (E.D. Pa. 1975).

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[2]The Sherman Act does not purport to afford remedies for all torts or breaches of contract committed by or against persons engaged in interstate commerce. Hunt v. Crumboch, 325 U.S. 821 (1944). In short, not every case is an antitrust case, and that is particularly true of the case at bar.

Point II

The Plaintiff amended allegations are insufficient to establish Sherman Act subject matter jurisdiction in that there is not substantial effect on interstate commerce.

Petitioner would have this Court believe that the entire physician/patient/third-party payor system rests on the Court's reversal of this case. When stripped of such grandiose platitudes, however, this case merely and singularly involves the decision of one hospital in west central Florida not to renew the petitioner's staff privileges at that hospital.

This Court is eminently familiar with the interstate commerce requirements of the Sherman Act. Petitioner Moles does not maintain, and has not in the past, that the activities alleged are "in" interstate commerce. Subject matter jurisdiction, if at all, is premised on the substantial effect" on interstate commerce theory. In short, to state a claim over which the Federal Courts have jurisdiction, Moles must allege ultimate facts that demonstrate that the complained of activity had a substantial effect on interstate commerce.

To determine if that requirement has been met, the Petitioner's factual allegations must be reviewed and taken as true. See, e.g. McLain v. Real Estate Board of New Orleans, Inc., _____ U.S. _____, 100 S.Ct. 502 (1980); Hospital Building Co. v. Trustees of the Rex, 425 U.S. 738 (1976). Under the heading, "Trade and Commerce," beginning with paragraph 12 and continuing through paragraph 25 of the amended complaint, Moles attempts to sufficiently allege the interstate commerce requirements but fails. Recognizing that appointment of licensed physicians to the Defendant Hospital's medical staff is controlled by the By-Laws of the Defendant Hospital and, at most, by Florida law (neither of which are within interstate commerce), Moles alleges that he receives a substantial portion of the fees charged his patients from insurance carriers and the federal government under the Medicare and Medicaid programs. Moles alleges that some of these insurance carriers are located out of Florida, and that funds from those companies, along with the funds from the

federal government, cross state lines, thereby establishing interstate commerce.

These allegations fail to meet the interstate commerce requirements because (1) the relationship between Petitioner and Defendants is not in interstate commerce; (2) there is no nexus between the anticompetitve activity purportedly alleged (not renewing Petitioner's staff privileges) and interstate commerce (flow of money); and (3) even assuming there is a nexus, it is incidental and de minimis, not resulting in a substantial effect on interstate commerce. In short, the mere fact that some funds which may ultimately go to the petitioner cross state lines, whether they be from insurance companies or the federal government, is insufficient to meet the interstate commerce requirements of the Sherman Act.

Petitioner evidently feels the substantial effect upon interstate commerce revolves around his ultimate receipt of some payment for his medical services to his patients from funds which have traveled across state lines. The fact that

some money may cross state lines, however, has no nexus to the anticompetitive activities alleged which appears to be some conspiracy to curtail petitioner's medical practice. Petitioner may not invoke the Sherman Antitrust jurisdiction of the federal courts by merely alleging some contact with something which has crossed a state line or has its genesis with the federal government.

An analysis of the allegations in the amended complaint reveal that Moles' patients are the person or persons chargeable for the medical services he performs.[3] Those patients are responsible for the payment of Moles' fees, although some or all of those fees may be ultimately paid by an insurance company or the federal government in relation to some patients. Petitioner has not alleged that Defendants' actions affected his relationships with the insurance carriers or the federal government. There is no allegation that

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[3] Customarily, a person for whom a service is performed is responsible for the payment to the provider of that service. Petitioner alleges that he provides medical services to his patients. The logical inference then is that those patients are responsible for paying him. Petitioner has not alleged otherwise, and he has the burden of pleading the ultimate facts upon which he relies.

Defendants' actions affected the relationship of his patients with their insurors or the federal government; there is no decrease in the benefits those patients receive. Nor has petitioner alleged that Defendants' actions have affected his entitlement to payment for medical services he performs. The Defendants' actions, if true, have not affected petitioner's relationship with the insurance companies nor with the federal government. He can still obtain funds from those sources.

Moles obviously takes the position, however, that the mere receipt of federal funds in the form of Medicare/Medicaid payments is sufficient to automatically establish Sherman Act jurisdiction. This logic is fallacious for at least three reasons: first, the mere presence of federal funds does not invoke the antitrust jurisdiction of the federal courts or establish interstate commerce under the Sherman Act in and of itself.

Second, taken to its logical conclusion, the interstate commerce requirement of the Act would be a nullity in every case in which United States currency was utilized for payment. Such an absurd conclusion was not intended by Congress in its enactment of 15 USC §1, et seq., nor permitted by the commerce clause of the United States Constitution.

Third, although there are no cases directly holding that the mere receipt of Medicare/Medicaid funds establishes the jurisdictional basis in antitrust cases, the courts' holding vis-a-vis the receipt of federal funds in other hospital cases to establish jurisdiction is helpful. Specifically, receipt of Hill-Burton funds, 42 USC §§291, et seq., has been repeatedly held insufficient to establish the state action requirements in cases dealing with physician staff privileges in participating hospitals. See Madry v. Sorel, 558 F.2d 303 (5th Cir. 1977), cert. denied., ____ U.S. ____(1978); Watkins v. Mercy Medical Center, 520 F.2d 891 (9th Cir. 1975); Jackson v. Norton-Children's Hospitals, Inc., 487 F.2d 502 (6th Cir. 1973); Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973); Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

Moreover, in Slavcoff v. Polyclinic Hospital, 375 F.Supp. 999 (M.D. Pa. 1974), the court held that

> [T]he hospital's receipt of a substantial portion of its operating income from the Medicare and Medicaid programs does not convert the activity challenged here into governmental action. 375 F.Supp. at 1003.

See Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973). Mere receipt of federal funding through Medicare or

Medicaid does not establish interstate commerce for antitrust jurisdictional requirements.

Assuming arguendo that there is a nexus, it is unconsequential and creates no substantial effect on interstate commerce. In Wolf v. Jane Phillips Episcopal-Memorial Medical Center, 513 F.2d 684 (10th Cir. 1975), a case very similar to the case at bar, the plaintiff, an osteopathic physician practicing in Bartlesville, Oklahoma, sought medical staff privileges at the two hospitals in town. His applications were denied and he sought redress, alleging antitrust violations. The court, citing United States v. Oregon State Medical Society, 343 U.S. 326 (1952), Riggall v. Washington County Medical Society, 249 F.2d 266 (8th Cir. 1957), cert. denied, 355 U.S. 954 (1958), and Spears Free Clinic and Hospital v. Cleere, 197 F.2d 125 (10th Cir. 1952), held that the single doctor's practice in relation to the non-admitting hospital was no more than, at most, "an insubstantial effect upon interstate commerce." 513 F.2d at 687.[4] Likewise, the Petitioner's practice of medicine and

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[4] Petitioner misinterprets the holding of Wolf at pg. 10 of his brief. Wolf held there was no substantial effect alleged by the plaintiff—the court did not hold that the practice of medicine is not a trade or commerce. The question of exemption was noted but not discussed.

furnishing medical services sub judice is wholly intrastate in character and results in the same insubstantial effect. See Elizabeth Hospital v. Richardson, 269 F.2d 167 (8th Cir. 1959).

In Crane v. Intermountain Health Care, Inc., ____ F.2d _____ (10th Cir. 1980), the Tenth Circuit cited with approval its holding in the Wolf case. Quoting from Wolf, the Crane court held that

> aside from a general allegation that his business involves interstate commerce, the plaintiff does not suggest that the defendants' conspiracy threatens his purchase of interstate goods or that the flow of such goods would be affected in any way by his exclusion from the defendants' medical staff. * * * Whatever effect the alleged conspiracy might have upon interstate commerce in goods purchased by the plaintiff is insubstantial and therefore an insufficient basis for jurisdiction.

_____ F.2d at _____. The Tenth Circuit cogently and correctly distinguished Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); and Hospital Building Co. v. Trustees of Rex Hospitals, 425 U.S. 738 (1976). Those distinctions directly apply in this case.

In Trustees of the Rex Hospital, the plaintiff, a North Carolina corporation operating a 49-bed hospital in Raleigh, North Carolina, sought to relocate and expand its

capacity to 140 beds. Its plans were stymied allegedly by the concerted action of the defendants. In instituting suit, the plaintiff alleged several areas of interstate commerce: (1) 80% of the plaintiff's supplies and medicines are purchased outside of North Carolina; (2) a substantial number of patients at plaintiff's hospital come from areas outside North Carolina; (3) a large portion of its revenues come from out-of-state insurance companies or from the federal government through Medicare and Medicaid programs; (4) plaintiff pays a management service fee based on gross receipts to its parent company, a Delaware corporation based in Georgia; and (5) a large part of the plaintiff's four-million dollar expansion was planned to be financed through out-of-state lenders. Plaintiff alleged that all these interstate commerce involvements were adversely affected by defendants' anticompetitive conduct.

In reviewing the above allegations, the Supreme Court held that

> . . . the complaint, fairly read, alleges that if respondents and their co-conspirators were to succeed in blocking petitioner's planned expansion, petitioner's purchases of out-of-state medicines

> they would otherwise be. Similarly, the management fees that petitioner pays to its out-of-state parent corporation would be less if the expansion were blocked. Moreover, the multimillion dollar financing for the expansion, a large portion of which would be from out of state, would simply not take place if the respondents succeeded in their alleged scheme. This combination of factors is certainly sufficient to establish a "substantial effect" on interstate commerce under the Act. 425 U.S. at 748 (Emphasis added).

By comparison, Moles' amended complaint is easily distinguishable. Aside from the fact that our petitioner is a physician, whereas the plaintiff in the Rex was a 49-bed hospital, the alleged interstate commerce is de minimis when compared. petitioner has only superficially alleged that he receives funds from out-of-state insurance companies and the federal government. He has not alleged how much comes from these sources or the percentage that comprises of his total income. Moreover, this is but one of five categories alleged in the Rex. And the Supreme Court held it was a combination of all those alleged interstate commerce activities, including the loss of four-million dollars in proposed financing, that precipitated its finding of "substantial effect."

Petitioner does not allege he purchases medical equipment, supplies or drugs in interstate commerce, much less the amount of those purchases. He does not allege treatment of out-of-state patients -- in fact, he does not allege that he treats any patients. All that petitioner alleges is that there is an "interstate" fund which provides the substantial fiscal basis for the business of providing health care for compensation" (¶20, Moles' amended complaint, R-3).

Petitioner's allegations are but a drop in the proverbial bucket and do not meet the interstate commerce requirements.

Petitioner also relies on McLain v. Real Estate Board of New Orleans, Inc., _____ U.S. _____, 100 S.Ct. 502 (1980).[5] The Supreme Court succinctly set forth the Sherman Act interstate commerce test:

> To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings either that the defendants' activity is itself in interstate commerce or, if it is local in

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[5]Although McLain was decided after the appellate briefs were submitted in this cause, the Fifth Circuit panel laborously questioned counsel for respondents on the effect of McLain on this case. The per curian affirmance was entered two days after oral argument.

> nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce. Gulf Oil Corp. v. Copp Paving Co., supra 419 U.S. at 202.

Petitioner complains, however, that the trial court misapplied this test in ruling against him by finding no "net" affect on interstate commerce. The petitioner misreads the trial court's opinion. Specifically, Judge Young held that the amended complaint contained no allegations which demonstrated any affect on interstate commerce, whether "net", "gross" or otherwise:

> There have been no allegation that defendants have caused any increase (or decrease) in fees charged thereby causing a change in the flow of insurance benefits flowing in interstate commerce from the federal government and/or insurance carriers to the ultimate beneficiaries. (Memo opinion pg. 11).

The petitioner's amended complaint contains no allegations within the syntax of McLain which "stimulates or retards," has an "affect", or otherwise "impacts" the flow of interstate commerce, much less to a significant or substantial degree.

The Sherman Act requires activity in interstate commerce or activity which has a substantial effect on interstate commerce before a violation of of its provisions can be established. As the Fifth Circuit Court of Appeals said in Feminist Women's Health Center v. Mohammed, 586 F.2d 530 (5th Cir. 1978),

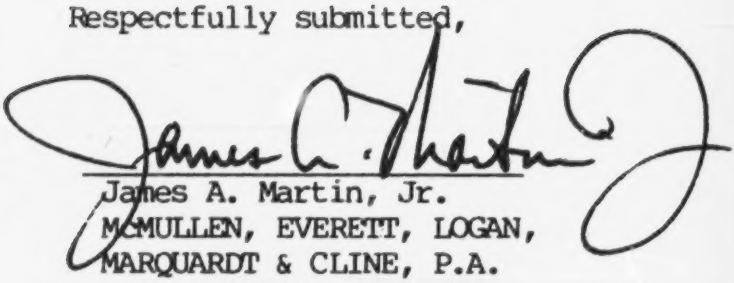
> We recognize that there must be a limit on the reach of Sherman Act jurisdiction. 586 F.2d at 541.

Petitioner's amended complaint does not meet those interstate commerce requirements either in theory or in specific allegations. Therefore, this Honorable Court does not have subject matter jurisdiction over the amended complaint herein, nor does that amended complaint state a claim which relief can be granted.

Conclusion

The learned trial court was eminantly correct in dismissing the petitioner's complaint. In the words of Judge Young, "not only are the interstate commerce allegations insufficient, but in addition, the allegations of conspiracy fail to adequately allege that some person other than an officer or agent of the Defendant hospital corporation conspired with the Defendant hospital." Memorandum Opinion, Page 15. This Honorable Court should deny the Petitioner for Writ of Certiorari.

Respectfully submitted,



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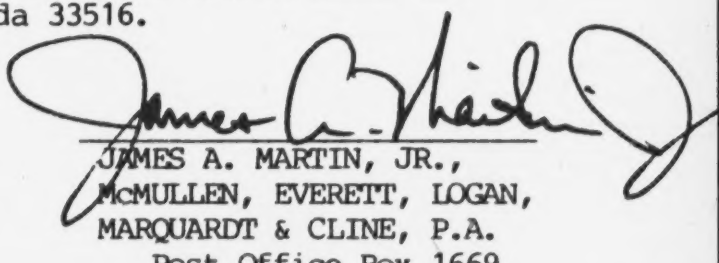
CERTIFICATE OF SERVICE

I, JAMES A. MARTIN, JR., Attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of September, 1980, I served copies of the foregoing Response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the Petitioner

by leaving three copies thereof at the office of Howard C. Batt, Esq., Counsel for Petitioner, at his office at 600 Bypass Drive, Suite 200 Clearwater, Florida 33516.



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